No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LEROY CLARKE,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Walter Bilbro, Jr.
WALTER BILBRO &
ASSOCIATES, P.A.
38 Broad Street
Post Office Box 687
Charleston, South Carolina 29402
803-722-7776

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I.

Did the trial court's instruction to the jury on reasonable doubt shift the burden of proof to the Appellant to establish a doubt for which a juror could articulate a reason before acquitting him?

II.

Did the trial court err by improperly defining reasonable doubt as a substantial doubt for which a reason must be given before Petitioner could be acquitted, and in refusing Petitioner's Instruction No. 11 which properly defined reasonable doubt, thereby denying Petitioner due process by allowing the jury to apply a lesser evidentary burden in its deliberations and the Constitutional standard of proof of guilt beyond a reasonable doubt?

III.

Was the Petitioner's right to due process

denied by the trial court's failure to define to the jury the term, criminal intent, as an element of murder?

IV.

Was the Petitioner denied due process when the trial court failed to give Petitioner's request to instruction number 4 defining and distinguishing the terms, "not guilty" and "innocent", thereby confusing the jury when it was deliberating its verdict?

PARTIES

The Parties are properly set forth in this Petition's caption on it's title page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031, 89 LEd 1495,

Sibery v. State, 133 Ind. 677, 33 NE 681,

Smith v. State, 547 S.W.2d 925 (1977),

State v. Arnold, 266 SC 153, 221 SE2d 867 (1976)

State v. Bell, 90 N.M. 134, 560 Pacific 2d 925,

State v. Bowers, 65 SC 207, 43 S.E. 656 (1902),

State v. Davis 482 S.W.2d 486 (1972).

State v. Coleman, 8 SC 237 (1875),

State v. Cowan, 108 Iowa 208, 78 N.W. 857,

State v. Harrison, 149 N.J. Super. 220, 373 Atlantic 2d 680 (1977),

State v. Lee, 113 Iowa 348, 85 N.W. 619.

State v. McDonald, 89 Wash. 2d 256, 571 Pacific 2d 930 (1977),

State v. Thraikill, 73 SC 314, 53 SE 482 (1905).

State v. Wilson, 104 SC 351, 89 S.E. 301 (1915).

Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed 2nd 468 (1978),

U. S. v. Atkins, 487 F.2d 257 (8th Circuit, 1973),

U. S. v. Alvero, 470 F.2d 981 (5th Circuit, 1972),

U. S. v. Boyce, 340 F.2d 418 (1964)

U. S. v. Bridges, 499 F.2d 179 (7th Circuit, 1974),

U.S. v. Chiantese, 560 F.2d 1244 (5th Circuit 1977).

U. S. v. Christie, 444 F.2d 448 (6th Circuit, 1971),

U. S. v. Crouch, 528 F.2d 625 (7th Circuit, 1976),

U.S. v. Curley, 643 F2d 299

U. S. v. Harris, 346 F.2d 182 (4th Circuit 1965

U. S. v. Kirk, 496 F.2d 947 (8th Circuit, 1974),

U. S. v. Muckenstrum, 515 F.2d 568 (5th Circuit, 1975),

U. S. v. Wright, 542 F.2d 975 (7th Circuit, 1976),

U. S. v. Zimeri-Safie, 585 F.2d 1318 (5th Circuit, 1978),

In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970)

REPORTS OF OPINIONS

Petitioner's conviction on appeal was affirmed by the Supreme Court of South Carolina in Memorandum Opinion No. 82-MO-371 filed on December 28, 1982. The text of this Opinion is set forth in Appendix A to this Petition.

JURISDICTION

The opinion of the Supreme Court of South Carolina was handed down and filed on December 28, 1982. The jurisdiction of this Honorable Court is invoked by prayer for review of the Supreme Court of South Carolina's decision denying Petitioner relief because his Federal Constitutional rights had been violated in a criminal prosecution instituted by the State of South Carolina. Petitioner is a natural born citizen of the United States and resident of the State of South Carolina.

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

AMENDMENT V (Article)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV (Article)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2... .

CODE OF LAWS OF SOUTH CAROLINA, 1976

SECTION 16-3-10

"Murder" is the killing of any person with malice aforethought, either expressed or implied.

STATEMENT OF THE CASE

On August 26, 1981, Leroy Clarke, the Petitioner, undertook some renovations to a house trailer located at "Leroy's Landing", Berkeley County, South Carolina. Thereafter, Petitioner went hunting at Wassamasaw Swamp for small game with a 1939 Stevens .22/.410 over and under single shot rifle and shotgun. When Petitioner finished hunting, he put the gun on the floorboard of his white Ford Courier truck with the stock against the passenger door and the barrel lying across the transmission hump. The gun was loaded with a single .410 shell and a .22 calibre bullet.

Around 3:00 o'clock P.M. the Petitioner left the hunting area and drove twenty miles to Moncks Corner, South Carolina to pick up cleaning compound and other supplies for continuing the refurbishing of his trailer. Between 4:00 and 4:30 P.M. Appellant left Moncks Corner

to proceed directly home by South Carolina Route 6. Along the way, the Petitioner decided to stop at the Highway 6 Gulf Station to gas his truck and obtain a soft drink.

When he initially pulled into the area of the gas pump, the Petitioner did not recognize the deceased or his yellow Toyota truck beside the gasoline pumps. The Petitioner turned off his truck's ignition and placed the keys in his outside shirt pocket, intending to go inside the building adjacent to the gasoline pumps to get a soda and order gasoline. (Appendix C (1) Pages 26-28)

Petitioner did not recognize the deceased until he had exited his truck and was standing on the ground with the driver's door still open. Petitioner matter of factly stated to the deceased, "One of these days I'll beat your behind for what you're doing to me out there." (Appendix C (1) Page 28-29) The Petitioner

after making the remark intended to walk on past the front of his truck and enter the store; however, the deceased was holding a knife with a long blade protruding out of his right hand and turned towards the Petitioner. The deceased said to the Petitioner, "You son of a bitch, this place is not big enough for both of us." "Do it now", or "Try it now." At the same time, the deceased advanced quickly with his right arm up above his head with the knife protruding from the heel of his right hand. He came straight towards the Petitioner. The Petitioner thought about getting back into the truck and leaving, but the keys were not in the ignition. Petitioner saw the single shot .410 laying on the floorboard, drew the gun from the truck, yelled "Stop" or something to that effect, stepped backwards, and fired the gun towards the deceased who was only three or four feet away. (Appendix C (1) Pages 29-35) The deceased was struck in the

right arm pit (Appendix C (1) Page 12 & 13), reeled backwards, turned and fell with the knife still clutched in his right hand. (Appendix C (1) Page 36; Appendix C (1) Pages 20-21) The Petitioner never left the immediate area by the driver's door of his pickup truck. (Appendix C (1) Pages 19-20)

The Petitioner, still afraid, left the scene and went home, leaving the gun on the floor of his pickup truck. He changed clothes and drove in another vehicle to his cousin's house because he needed time to think. While at his cousin's, the Petitioner determined to turn himself in and telephoned Deputy Sheriff James Broughton. Deputy Sheriff Broughton was not in. Petitioner called back in an hour, and Sheriff Broughton was still not available. The Petitioner asked his cousin to go find Broughton and tell him to come and place your Petitioner in custody. Sheriff Broughton soon arrived, and

Petitioner turned himself in about an hour and a half after the gun was fired. (Appendix C (1) Pages 36-40)

Dr. Robert Stewart, a forensic pathologist, performed the autopsy on the deceased. Called by the State at trial, Dr. Stewart testified that the deceased's right elbow was raised up a little higher than shoulder level or even with the base of the neck and pointed directly in front of the deceased's torso at the time of the gun shot. The doctor testified the fatal shot was fired from several feet away. (Appendix C (1) Pages 12-14). He opined that the deceased was standing upright when he was shot. He further said that if the deceased had been bent over or leaning forward as the State suggested, the gun shot wound's path would have traveled slightly downward and towards the front of the chest as opposed to the downward path that it actually took, to wit, entering the right armpit, partially striking the

deceased's back bone, and terminating in the lower left lung. (Appendix C (1) Page 13-14)

Lt. Dan DeFreese, S.L.E.D., a ballistics expert (Appendix C (1) Page 41), conducted tests with the shotgun in an attempt to find the range at which the spread of the shot most closely approximated the spread of the shot in the shirt of the deceased. DeFreese testified that the range of four feet from the muzzle of the shotgun to the shirt most closely approximated the diameter of the hole and the pellet pattern in the deceased's shirt. He further stated that a similar pattern could occur at distances between three and five feet. (Appendix C (1) Pages 42-45) Other witnesses at trial could not approximate the distance of the deceased to the Petitioner at the time the fatal shot was fired. (Appendix C (1) Pages 15-16 and Appendix C (1) Pages 24-24)

The deceased and Petitioner were

both white males approximately the same age and size. The Petitioner had a partial physical disability in that he only has vision in one eye. The deceased and Petitioner knew one another casually, and both lived in generally the same area of Berkeley County. No bad blood existed between the two, and on a prior occasion, Petitioner had helped save the deceased's life when he was lost in a storm while boating. (Appendix C (1) Pages 41-42)

At the close of the evidence, the Petitioner offered his requests to charge to the court for consideration. Requested instruction four (4) distinguished the terms "not guilty" and "innocence". (Appendix C (4) Page 51) Requested instruction five (5) defined intent (Appendix C (4) Paes 51-52) an essential element of common-law murder. Both instructions were refused by the court and the Petitioner took exception. (Appendices B (1) Pages 2-3 and B (2) Page 4)

The trial court then charged the jury that a reasonable doubt is "...a substantial doubt, one arising out of the evidence or the lack of evidence for which one honestly seeking the truth can give a reason." (Appendix C (3) Page 49). Petitioner took exception (Appendices B (4) Pages 6-7 and B (5) Pages 8-10) and again argued his request to charge instruction eleven (11) properly defining reasonable doubt to the court (Appendix C (4) Page 51 This request was overuled. (Appendices B (3) Page 5 and B (6) Page 8-11) When the jury returned a verdict of guilty, the Petitioner appealed direct to the Supreme Court of South Carolina. (Appendix C (5) Page 53) Petitioner's conviction was affirmed on appeal in Memorandum Opinion 82-MO-371, filed December 28, 1982 without opinion. (Appendix A Page 1)

ARGUMENT I.

DID THE TRIAL COURT'S INSTRUCTION TO THE JURY ON REASONABLE DOUBT SHIFT THE BURDEN OF PROOF TO THE APPELLANT TO ESTABLISH A DOUBT FOR WHICH A JUROR COULD ARTICULATE A REASON BEFORE ACQUITTING HIM?

At the close of the evidence, the trial court instructed the jury, "We speak of a reasonable doubt as a substantial doubt, one arising out of the evidence or the lack of evidence for which one honestly seeking to find the truth can give a reason. ... Should you have a reasonable doubt as to the defense which the Petitioner has put up. ..." (Appendix C (3), Page 49). The Petitioner timely objected to this charge as shifting the burden to the Petitioner to establish a reason in the jury's mind why Petitioner did not commit the crime. (Appendix B (5), Pages 8-10) The trial court overruled Petitioner's objection, and the Petitioner

appealed to the South Carolina Supreme Court. The Appellate Court affirmed lower court.

Unlike standard measures, reasonable doubt is the embodiment of a legal principle that knows neither size nor dimension. In the past, trial courts have varied in their interpretation of this principle, however, all have retained the reasonable doubt standard as the standard by which to measure evidence of alleged criminal misconduct. It is not, and has never been, a vehicle which shifts the burden of proof to the Defendant at a criminal trial. Winship, Supra.

By instructing the jury that a reasonable doubt is one for which you can give a reason, the trial court below is using the reasonable doubt standard as a vehicle in shifting the burden to the Petitioner to establish a doubt for which a juror or the Defendant can give a reason. This instruction has been held to be fatal

error in Owens v. United States, 130 Fed. 279, 64 CCA 525, Sibery v. State, 133 Ind. 677, 33 NE 681, Avery v. State, 124 Ala. 20, 27 South. 505, Morgan v. State, 48 Ohio State 371, 27 N.E. 710, Cross v. State, 132 Ind. 65, 31 N.E. 473, Callen v. State, 22 Neb. 519, 35 N.W. 405, Carr v. State, 23 Neb. 749, 37 N.W. 630, State v. Cowan, 108 Iowa 208, 78 N.W. 857, and State v. Lee, 113 Iowa 348, 85 N.W. 619.

Similar charges have been critized. Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895, (good and substantial reason therefor held to be reversible error), Issacs v. State, Mis., 337 Southern 2d 928, (language defining reasonable doubt as one for which a reason can be given cannot be upheld), U. S. v. Harris, 346 F.2d 182 (4th Circuit 1965), (reasonable doubt as one "for which you can assign a reason" not wholly free from question), U.S. v. Boyce, 340 F.2d 418 (1964), (attempts to improvise definitions of

reasonable doubt in this manner have usually led to trouble and are best avoided), and Dunn v. Perrine, 570 F.2d 21 (1st Circuit 1978), (doubt based on good and sufficient reason held to be improper).

The reasonable doubt standard is a principle of substance not procedure, and the effect of such an instruction is facially apparent. The State is put to the burden of proving the Defendant guilty beyond a reasonable doubt, a burden that never shifts to the Defendant. Winship, supra. If the State puts forth a prima facia case against the Defendant and the jury returns a guilty verdict, then no harm is done. However, where a close case leaves the juror in doubt as to their verdict, a doubt for which they cannot base upon an articulated reason, this instruction then shifts the burden to Petitioner to provide evidence for that reason, so each juror will vote for acquittal.

This charge is without legal precedent and overlooks the essential nature of reasonable doubt itself. (See Winship, supra) It is often the want of sufficient knowledge in relation to the facts constituting the guilt of the accused that causes the juror to doubt. Sidery, supra. A juror may be unconvinced by the evidence and yet be unable to give a reason, or to express any reason, for the result of his mental process and experience. But, if such doubt be honestly and reasonably entertained, the juror should vote for acquittal. Owens, supra.

This charge in the instant case is tantamount to saying that a doubt is not reasonable unless a juror can articulate a reason for it based on the evidence or the want of it. In Pettine v. Territory of New Mexico, 201 F. 489 (8th Circuit 1912), the court of appeals held as reversable error a charge idential to that given below,

stating:

> "The ability to give sound reasons for their doubts or their beliefs is not given to many men, and every prudent and thoughtful man at once recognizes the fact that in the graver and more important affairs of his own life, doubts for which he can formulate no convincing reason often induce him to act or refuse to act. To require every person accused of crime to present such a state of evidence at his trial that every juror can give a sound reason based on the testimony for his doubt of his guilt before he may vote for his acquittal places too heavy a burden on the accused. It destroys the rule of reasonable doubt, and substitutes for a reasonable doubt a demonstrable doubt logically and conclusively sustained by the evidence or want of it." (Id. at 496)

The constitutional statute of such a misstatement is beyond question. Due process requires that no man should be deprieved of his freedom under the law unless the jurors are able to say, upon their conscious deliberations, that the evidence before them was sufficient to prove beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged. Davis v. U. S., 160 U.S. 484, 493, 16 S.Ct. 357, 360. The fact that such a charge was only given

once does not excuse the State for error. When it can reasonably be interpreted as shifting the burden to the accused to produce proof of innocence, the instruction will not be absolved because phrases defining the proper burden of proof are included in the charge. U.S. v. Chiantese, 560 F.2d 1244 (5th Circuit 1977).

In light of the trial court's refusal to give Petitioner's requested instruction number eleven (11) which correctly defined the phrase "reasonable doubt",[2] this court can only conclude that the trial court's charge defining reasonable doubt as a doubt for which you can give a reason unduly shifts the burden to the accused to create a doubt for which a juror can give reason, and for that reason alone, offends due process.

---

2 DEFENDANT'S REQUEST TO CHARGE NO. 11: Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or

imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.' (People v. Garcia, California Court of Appeals, December 29, 1975). (Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320).

ARGUMENT II.

DID THE TRIAL COURT ERR BY IMPROPERLY DEFINING REASONABLE DOUBT AS A SUBSTANTIAL DOUBT FOR WHICH A REASON MUST BE GIVEN BEFORE PETITIONER COULD BE ACQUITTED, AND IN REFUSING PETITIONER'S INSTRUCTION NO. 11 WHICH PROPERLY DEFINED REASONABLE DOUBT, THEREBY DENYING PETITIONER DUE PROCESS BY ALLOWING THE JURY TO APPLY A LESSER EVIDENTARY BURDEN IN ITS DELIBERATIONS AND THE CONSTITUTIONAL STANDARD OF PROOF OF GUILT BEYOND A REASONABLE DOUBT?

Reasonable doubt is the standard by which to measure the evidence in determining a criminal defendant guilty, and is of such dimension that due process explicitly protects those accused against conviction except upon proof beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). In applying this standard at trial, the Fourteenth Amendment demands safeguards against any dilution of this principle and requires that a defendant's guilt must be

established beyond a reasonable doubt. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed 2nd 468 (1978), Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed 2d 126 (1976).

Here, at the close of the evidence the trial court charged the jury that "...we speak of a reasonable doubt as a substantial doubt..." (Appendix C (3) Page 49) Counsel for Petitioner timely objected to this equation and agreed that "substantial and reasonable are not synonomous." (Appendix B (4) Pages 6-7) The trial judge overruled Petitioner's objection whereupon the jury returned a verdict of guilty.

By equating the term "reasonable doubt" with the term "substantial doubt", the trial court below erred causing that dilution which was forewarned by The Supreme Court in Taylor, supra, and Estelle, supra. In the past, trial courts giving a reasonable doubt instruction that equates "reasonable doubt" with

"substantial doubt" have been similarly criticized.[1]

The legal issue involved is whether or not the word "reasonable" means the same as "substantial" in determining that standard mandated by due process. Webster's Seventh New Collegiate Dictionary (abridged), (1969) defines "reasonable" as "moderate, fair, or not extreme or excessive." The same defines "substantial" as "firmly constructed, sturdy, important, or essential."

---

1 U. S. v. Zimeri-Safie, 585 F.2d 1318 (5th Circuit, 1978), U. S. v. Wright, 542 F.2d 975 (7th Circuit, 1976), U. S. v. Crouch, 528 F.2d 625 (7th Circuit, 1976), U. S. v. Muckenstrum, 515 F.2d 568 (5th Circuit, 1975), U. S. v. Bridges, 499 F.2d 179 (7th Circuit, 1974), U. S. v. Kirk, 496 F.2d 947 (8th Circuit, 1974), U. S. v. Atkins, 487 F.2d 257 (8th Circuit, 1973), U. S. v. Alvero, 470 F.2d 981 (5th Circuit, 1972), U. S. v. Christie, 444 F.2d 448 (6th Circuit, 1971), State v. Harrison, 149 N.J. Super. 220, 373 Atlantic 2d 680 (1977), State v. McDonald, 89 Wash. 2d 256, 571 Pacific 2d 930 (1977), Smith v. State, 547 S.W.2d 925 (1977), and State v. Davis 482 S.W.2d 486 (1972).

The American Heritage Dictionary of the English Language, (Abridged), 1981 likewise defines "reasonable" as "not excessive or extreme", and "substantial" as "substantially built, strong, ample, considerable in amount or estent." By way of example, if your boss offered you a reasonable pay raise as opposed to a substantial one, which whould you choose? Likewise, if your doctor told you that there was a substantial risk involved in having an operation, you would feel less at ease than if your doctor had told you there was only a reasonable risk.

It is clear from the common dictionary definitions that substantial and reasonable are not words of equal degree and therefore, cannot be equated. Many appellate courts agree (See: Wright, supra, Bridges, supra, Rodriguez, supra, Muckenstrum, supra, and Crouch, supra). In Atkins, supra, the 8th Circuit expressly stated that "substantial doubt is not the

equivalent of a reasonable doubt." Id. at 260. The term "substantial" implies that a stronger conviction of doubt is needed by the jury to acquit, and conversely its use in a criminal case greatly reduces the State's burden of proof at trial. Smith, supra, at 927, Atkins, supra, at 260.

An instruction to the jury containing the alternative statement that reasonable doubt means a substantial doubt does not constitute plain error under F.R.Crim. P. 52 (b) in the absence of an objection as is required by F.R.Crim.P. 30. Atkins, supra. However, the 7th Circuit in Wright, supra, expressly stated that "...A District Court giving a reasonable doubt instruction containing the challenged equation notwithstanding a Rule 30 challenge can reasonably expect a reversal." Id. at 988. This argument, emphasizing the constitutional stature of such an instruction, is rendered moot by Petitioner's timely objection and is

offered solely to show the significance attached to such an instruction.

In light of the facts of the case, an instruction equating reasonable doubt with substantial doubt cannot be considered to be harmless error. At trial, the Petitioner raised the issue of self-defense. A prosecution witnesses testified that the Petitioner and the deceased were separated by a distance of sixteen (16) to eighteen (18) feet prior to the shooting (Appendix C (1) Pages 17-19) However, the evidence and testimony of the prosecution witnesses and the Petitioner was that Petitioner had always remained at the left side of his pickup truck immediately by the left door. (Appendix C (1) Pages 19-20 and 25) No one could pin point the location of the deceased at the time the fatal shot was fired except the Petitioner. It is uncontested that the deceased was found at the scene with a knife clutched in his right hand.

(Appendix C (1) Page 20).

A State's ballistics expert testified that the fatal shot was fired from a distance of between three (3) and five (5) feet, most probably three and one-half (3 1/2) to four (4) feet. (Appendix C (1) Page 45) The forensic pathologist called by the State testified that the deceased's right elbow was slightly elevated above the right shoulder in a raised position when the fatal shot entered the deceased's right arm pit. The wound indicated that the fatal shot was fired from several feet away. (Appendix C (1) Pages 12-13) Considering the fact that the deceased immediately prior to the shooting stated to the Petitioner "You son of a bitch, this place is not big enough for both of us.", a jury given the proper charge on reasonable doubt could reasonably infer the defense of self-defense.

This court should conclude that the instruction given by the trial court to

the jury equating reasonable doubt with substantial doubt was a violation of that standard of proof mandated by the due process clause of the Fifth and Fourteenth Amendments. Such an instruction tends to change and reduce the evidentary burden which must be met by the prosecution to prove guilt beyond a reasonable doubt. Therefore this trial instruction cannot be held to be harmless error in determining the outcome of Petitioner's trial.

ARGUMENT III.

WAS THE PETITIONER'S RIGHT TO DUE PROCESS DENIED BY THE TRIAL COURT'S FAILURE TO DEFINE TO THE JURY THE TERM, CRIMINAL INTENT, AS AN ELEMENT OF MURDER?

In submitting his requests to charge to the court, the Petitioner's offered instruction number #5 properly defining criminal intent.[1] The trial court refused, stating that the question of scienter would be covered in the court's general charge. (Appendix B (2) Page 4) The court then charged the jury that to convict Petitioner of murder, the prosecution must prove Petitioner's criminal intent and that the act was done

---

1 DEFENDANT'S REQUEST TO CHARGE NO. 5: Criminal intent under the law means an intent in the defendant's mind at the time of the commission of an act to violate the criminal law by commission of that act. In other words, "criminal intent" means the intention to commit a crime at the time the act is committed. More particularly in this case, "criminal intent" means the intention of the defendant to premeditatedly murder the deceased.

with malice aforethought. (Appendix C (3) Pages 49-50) No attempts were made to define criminal intent and the Petitioner timely excepted. (Appendix B (2) Page 4

Under section 16-3-10 of The Code of Laws of South Carolina, murder is defined as a common-law crime. State v. Coleman, 8 SC 237 (1875), State v. Bowers, 65 SC 207, 43 S.E. 656 (1902), State v. Wilson, 104 SC 351, 89 S.E. 301 (1915). In order to establish common-law murder, it is incumbent upon the State of South Carolina to establish that the act which produced death was carried out with the requisite malice aforethought and criminal intent on the part of the accused. State v. Arnold, 266 SC 153, 221 SE2d 867 (1976). Motive need not be shown, however, it is essential to prove the element of criminal intent. State v. Thraikill, 73 SC 314, 53 SE 482 (1905).

The error of the trial court is apparent. In failing to define the element of criminal intent, the trial court failed to provide adequate criteria by which the jury could determine whether the Petitioner had the requisite intent to commit the crime as charged.

Such an error does not always reach constitutional dimensions and the test to be applied is "...whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process...." Cupp v. Naughten, 414 U.S. at 147, 94 S.Ct. 400, 38 LEd 2d 368. Here, the ailing instruction goes to an essential element of the crime. In situations similar to that of Petitioner, such misinstruction and omission of instruction has been held to be

reverseable error.[2] In view of the United States Supreme Court's holding in Winship, supra, that the Constitution requires proof beyond a reasonable doubt of every element necessary to constitute the crime, such error cannot be regarded as merely harmless.

---

2 See U.S. v. Curley, 643 F2d 299 where District Court failed to instruct the jury that it must find that the Defendant had the specific intent to commit the act, Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031, 89 LEd 1495, where the trial court failed to submit to the jury the essential ingredients of the offense, State v. Bell, 90 N.M. 134, 560 Pacific 2d 925, failure to instruct on essential element is reverseable error, People v. Failla, (1966), 64 Cal. 2d 560, 51 Cal. Rptr. 103, 414 Pacific 2d 39, failure to define "felony" in definition of burglary requiring intent to commit a felony was reverseable error.

ARGUMENT IV.

WAS THE PETITIONER DENIED DUE PROCESS WHEN THE TRIAL COURT FAILED TO GIVE PETITIONER'S REQUEST TO INSTRUCTION NUMBER 4 DEFINING AND DISTINGUISHING THE TERMS, "NOT GUILTY" AND "INNOCENT", THEREBY CONFUSING THE JURY WHEN IT WAS DELIBERATING ITS VERDICT?

At the close of the trial, the Petitioner requested the trial court to instruct the trier of fact as follows:

> "The term not guilty is not synonymous with innocence. In our system of criminal justice, the term "not guilty" means the State did not prove the Defendant guilty beyond a reasonable doubt of each element of an offense; "not guilty" does not mean that you must find the Defendant innocent of the crime with which he was charged. One or more elements of the charge were simply not proven by the State."

This request was denied and the Petitioner took exception. (Appendix B (1) Pages 2-3)

The function of the trier of fact is not to decide whether the accused did not commit the crime, but to determine whether or not the prosecution has met its burden of proving the Petitioner guilty

beyond a reasonable doubt. However, the trial court, through its repeated insertion of the term "innocence" in its charge to the jury, substantially impaired this fundamental duty.

The common usage of the terms "guilty", "not guilty", and "innocent" factually describe three separate and distinct realities. "Guilty" factually describes the person who committed the crime. "Innocent" factually describes a person who did not commit a criminal act. "Not guilty" is the legal finding by the jury that the State has not presented sufficient evidence to meet its burden of proof.

A Defendant may be both "not guilty" and "innocent". However, innocence need not be proven in order to find an accused "not guilty." To find an accused "not guilty", the jury need only decide that the State has failed to meet its burden of proof. By using the term

"innocence" on numerous occasions in its charge to the jury, the trial court is necessarily implying that in order to acquit the Petitioner, they must go beyond "not guilty" and find that he did not commit the act. In view of the evidence in which Petitioner admitted firing fatal shot in self-defense, a finding by the jury that he did not commit the act is impossible. Bugliosi, Not Guilty and Innocent - The Problem Children of Reasonable Doubt, Crim. Just. Journal of Western State University of San Diego (1981).

The Petitioner's request to charge properly sets forth the distinction between the terms "not guilty" and "innocence." This distinction is necessary in view of the fact that Petitioner does not deny firing the fatal shot, but instead, interposed the defense of not guilty by reason of self-defense. By Petitioner admitting the physical commission of the fatal act, the presumption of innocence is

withdrawn and the Petitioner must establish by the preponderance of the evidence that he is "not guilty" by reason of self-defense. Thus, Petitioner's requested charge became critical to his defense.

The Petitioner is entitled to instructions pertaining to his theory of the case, U. S. v. Wright, 542 F.2d 975 (1976). An instruction articulately explaining to the jury that its function is not to determine the Appellant's innocence, but only to determine whether or not the prosecution has proven guilt beyond a reasonable doubt, is warranted by the circumstances. The failure of the trial court to give such a charge could only mislead the jury, allowing it to deliberate on the Petitioner's guilt or innocence and not whether the Petitioner is guilty or not guilty by reason of self-defense. The Petitioner was prejudiced by the trial court's incomplete instructions and its refusal to provide the requested charge.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests the Supreme Court of the United States to grant review of Petitioner's case.

Submitted by:
Walter Bilbro &
Associates, P.A.

BY: Walter Bilbro, Jr.

APPENDIX A

OPINION OF SUPREME COURT
OF SOUTH CAROLINA

Memorandum Opinion No. 82-MO-37
Filed December 28, 1982

PER CURIAM: Appellant was convicted of murder and sentenced to life imprisonment.

After careful consideration of the record and briefs, we are of the opinion that no error of law is present, and that a full written opinion would be without precendential value. Accordingly, the judgment of the lower court is affirmed under Rule 23 of the Rules of Practice of this Court.

APPENDIX B (1)

RULING DENYING PETITIONER'S INSTRUCTION 4

TRANSCRIPT OF RECORD PAGE 260, LINE 5 THROUGH PAGE 261, LINE 2

THE COURT: What do you say about Number 4, Mr. Solicitor?

MR. WILLIAMS: Your Honor, we would object to that charge. We find no basis for it or any prior use of that charge.

THE COURT: It's a new proposition for me, quite frankly.

MR. WILLIAMS: Yes sir, We would certainly object to it.

MR. BILBRO: Your Honor, I think , in fact, that it's one of the most important precepts of Common Law that the question is not guilt or innocence, but guilty or not guilty.

THE COURT: There's no question about that, but I don't know of anyprior decision that requires me to so charge.

MR. BILBRO: Again, Your Honor, it is a

model charge. It is not a ---

THE COURT: I ask you once again, what is your authority for it?

MR. BILBRO: It is a model charge. I did not get it from a South Carolina case, Your Honor.

THE COURT: I will refuse it. ...

APPENDIX B (2)

RULING DENYING PETITIONER'S INSTRUCTION 5

TRANSCRIPT PAGE 261, LINES 2 THROUGH 5

THE COURT: ...I think the question of scienter will be covered in my general charge, and I therefore will decline to charge Number 5.

TRANSCRIPT PAGE 281, LINE 22 THROUGH PAGE 282, LINE 1

MR. BILBRO: Thank you. Your Honor, of course, you had indicated earlier that Charges 4, 5, 6 and 7 were being denied. We woud except to those for the record.

THE COURT: Very Well.

APPENDIX B (3)

RULING DENYING PETITIONER'S INSTRUCTION 11

TRANSCRIPT PAGE 262, LINE 25 THROUGH PAGE 263, LINE 11

THE COURT: In effect, I'll charge Number 11. I've never heard of it being charged in these words in the State of South Carolina. What do you say about it, Mr. Solicitor?

MR. WILLIAMS: Yes, sir, Your Honor. We know of no prior cases in South Carolina. We again would -- your normal, reasonable charges to the jury in a case of this kind, Your Honor.

THE COURT: I'll put it in the same category as Number 1. If after my charge is complete you wish to request further charge in regard to it, I'll take it up with you.

APPENDIX B (4)

RULING OVER PETITIONER'S OBJECTION TO TRIAL COURT'S CHARGE EQUATING REASONABLE DOUBT TO SUBSTANTIAL DOUBT

TRANSCRIPT PAGE 282 LINE 2 THROUGH PAGE 283, LINE 4

MR. BILBRO: The other thing, Your Honor, I would like to point out is this. Your Honor, we would except to the charge, your charge of reasonable doubt. And the reason we would except to that, your Honor, is that we think that when Your Honor charges a jury that a reasonable doubt is a doubt for which one may give a reason, that it's a substantial doubt for which one seeking to find the truth may give a good reason, we feel that in that instance, Your Honor, the term -- to start with, substantial and reasonable are not synonymous.

To give an example, Your Honor, I

think when a person says: Do you want a reasonable fee, or do you want a substantial fee? Do you want a reasonable ---

THE COURT: I always wanted a reasonable and substantial fee, and I always considered them to be the same thing. When I practiced law, I was a pretty good lawyer. I thought it carried with it a substantial fee.

MR. BILBRO: Do you want a reasonable chance of survival, or do you want a substantial chance of survival? Do you want a reasonable raise from your employer, or do you want a substantial raise from your employer? Do you want to be acquitted on a reasonable doubt, or do you want to be acquitted on a substantial doubt? We think it requires them to find a much more substantial doubt.

TRANSCRIPT PAGE 284, LINES 23 AND 24

THE COURT: Your exception is noted. Anything further?

APPENDIX B (5)

RULING OVER PETITIONER'S OBJECTION DEFINING REASONABLE DOUBT AS A SUBSTANTIAL DOUBT FOR WHICH ONE HONESTLY SEEKING TO FIND THE TRUTH CAN GIVE A REASON

TRANSCRIPT PAGE 283, LINE 5 THROUGH PAGE 284, LINE 11

The other thing that we would point out to Your Honor is this. We believe that, while I understand that the Circuit Judges of our State do charge that a reasonable doubt is a doubt for which one may give a reason, we feel that by charging that that shifts the burden of proof from the prosecution to prove beyond a reasonable doubt to the defendant or the jury for them to try to give a reason ---

THE COURT: I very carefully told the jury that the burden never shifted to the defendant, and I told them that on at least

two occasions.

MR. BILBRO: There's no question about that, Your Honor, but within the scope of the charge of reasonable doubt, we suggest that when you say it's a substantial doubt for one seeking to find the truth may give a good reason, you're imposing on the jury to find a reason.

I believe, Your Honor, that the law is, if for any reason -- any reason. Even if they can't give a reason. Even if in their mind they for some reason cannot believe the truth of the witnesses, that at that time they then make the determination because of their right to judge the credibility -- and, goodness knows, credibility is one of the most esoteric things we can talk about. If for some reason, one they can't put their finger on, they can't give the reason, they don't like the way his eyes looked, they just didn't believe the way his demeanor came over, if that is the case, Your Honor, then that can

create a reasonable doubt, a doubt for which they don't even have to give a reason. It's simply a reasonable doubt in their minds, and the jury may so find it.

TRASCRIPT PAGE 284, LINES 23 AND 24

THE COURT: Your exception is noted. Anything further?

APPENDIX B (6)

RULING DENYING PETITIONER'S INSTRUCTION 11

TRANSCRIPT PAGE 284, LINES 12 THROUGH 24

For that reason, Your Honor, we would ask that you charge the following -- Defendant's Request Number 11. "It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge."

THE COURT: Your exception is noted. Anything further?

APPENDIX C (1)

TRIAL TRANSCRIPT - PERTINENT PORTIONS

TRANSCRIPT PAGE 44, LINES 12 THROUGH 18 AND PAGE 48, LINES 3 THROUGH 16

DR. ROBERT STEWART:

THE COURT: And that he is an expert in pathology?

MR. BILBRO: In forensic pathology, ye, sir.

THE COURT: Very well. It is, ladies and gentlemen, stipulated that the doctor is a medical doctor, that he is licensed to practice in South Carolina, that he is a specialist as a forensic pathologist. He will tell you what a forensic pathologist is. ...

A. Turn this way. Okay. We examined the clothing on the body. We matched up the holes of the wound on the shirt with the wound on the arm. From that examination, we found that the hole was right about in this area, which is the back fold of skin and other soft

tissues which make up the back of the armpit.

From the way the hole was going into the body with the least amount of distortion to that hole, which could be caused by movement of an arm, we found that the arm should have been approximately at this level. The upper arm -- this portion of the arm, or the lower arm, I cannot tell where exactly it was; but this arm was approximately level with the shoulder or the base of the neck.

TRANSCRIPTION PAGE 58, LINES 7 THROUGH 15 AND PAGE 61, LINES 1 THROUGH 11

Q. Conradi? Okay. And upon questioning by me on that occasion approximately two months ago, and again yesterday, did you also tell me, most probably, that the torso was in a upright position becuase, if the deceased had been bent over in any fashion, the

charge would have gone downward towards the front of the chest, as opposed to the path that it took downward into the lungs in this fashion? Am I correct?

A. Yes, sir. ...

What we did find was a single hole measuring 1.8 by 1.1 inch, with eight satellite holes, suggesting there was some spread of the shot. This is totally dependent upon the individual weapon, the ammunition used in the weapon, to make a precise determination of distance. However, we consider this, because of these indings, to be under the heading of a distant shotgun wound, generally indicating -- however, I must say that this is subject to ballistics testing -- of being several feet away from the body when it was fired.

TRANSCRIPT PAGE 76, LINE 7 THROUGH PAGE 78, LINE 6

JULIAN A. ADKINS:

Q. Now would you tell me, looking at the photograph that's Defendant's A for Identification, would you tell me, when you saw Shelby Hodge, do you know where he was standing?

A. He was leaning over in the bed of the truck the last time I seen him.

TRANSCRIPT PAGE 85, LINE 10 THROUGH PAGE 86, LINE 7

Q. All I'm asking you, sir, is when you were walking away from Mr. Hodge's truck, your back was to the scene where the incident occurred?

A. Right.

Q. You didn't see Mr. Clarke open the door and put his foot on the ground?

A. No, sir.

Q. And at the time he was doing that, you didn't see him with a shotgun in his

hand?

A. Well, I couldn't have seen him, if I'd have been looking at him.

Q. Whether you could or you couldn't, you didn't?

A. Well, I couldn't have seen him, if I'd have been looking at him.

Q. Whether you could or you couldn't, you didn't?

A. No, sir.

Q. And having not seen, something caught your attention when you got to the doore, and youi turned back around?

When you got to the door of your business.

A. Right.

Q. And that's when you saw Mr. Clarke standing by the front door of his truck with a gun?

A. Right.

Q. Thought nothing more about, and continued on inside the building?

A. Right, sir.

TRANSCRIPT PAGE 104, LINE 24 THROUGH PAGE 107, LINE 12

WENDY ADKINS:

Q. Okay. Try to picture putting me back the distance that you feel like Mr. Hodge was from the rear of his truck.

A. From the wheel of his truck?

Q. From the rear of his yellow Toyota. How far he was back up.

A. All right, where am I at? I'm where Leroy was at?

Q. No, you're where the front of Mr. Clarke's truck is.

A. Okay.

Q. Okay? And I'm at the rear of Mr. Hodge's truck right now.

A. All right. Stop.

Q. Okay. Now. I'm where Mr. Hodges is, and you're at the front of Leroy's truck. Would you please now place me, when I walk backwards, how far back Leroy would have been from the front of

his truck?

A. Okay. Stop.

Q. Okay. About how far do you think -- is this the correct distance, approximately, now?

A. I don't know. Like I said, I don't know. This is what I think.

Q. That's fair enough. Your Honor, could we get the Clerk to walk it off, please? ...

THE COURT: Mr. Clerk, measure that distance for them.

THE CLERK: Approximately eighteen feet.

MR. WILLIAMS: Your Honor, for the record, please let it indicate that the Clerk is -- this is certainly a casual measurement, at best there, with steps.

THE COURT: The jury is certainly aware of that. The jury is not under any misapprehension. They know well that he didn't have a ruler with him.

MR. WILLIAMS: Yes, sir.

THE COURT: They were looking at him. They

know it's an estimated distance. You understand that, of course, ladies and gentlemen.

BY MR. BILBRO:

Q. At the time the shot was fired, Mr. Clarke was standing in that position where the "x" is by the line that represents the front door of his vehicle?

A. Excuse me? Repeat.

Q. At the time Mr. Clarke fired the weapon, it's your testimony that he was standing by -- where the "x" is located there by his left front door?

A. No, he was not.

Q. He was not standing there?

A. Well, I don't understand. You have to repeat.

Q. I'm sorry, dear.

THE COURT: What he wants to know is where Mr. Clarke was at the time the shot was fired, if you know? Do you know where he was when the shot was fired?

THE WITNESS: Yes, sir, I do.

THE COURT: Well, tell him where he was. (Witness indicating on diagram.)

THE COURT: Didn't you say he was eight inches from it?

THE WITNESS: He's right here, where the dot was.

BY MR. BILBRO:

Q. Some eight inches to a foot from the open door of the truck, right?

A. Yes, sir.

TRANSCRIPT PAGE 141, LINE 18 THROUGH PAGE 143, LINE 23

JAMES M. D. WALL:

We turned him over. I removed his hat, his glasses, and a knife from his right hand.

Q. Now the knife in his right hand, describe that for us, please.

A. I really don't recall which direction the blade was facing in, and I didn't pull his hand open. I just pulled the

knife out like this. And I don't remember exactly where I put it. I think I just laid it on the ground there.

Q. Okay, sir. What kind of knife was it?

A. It was a pocket knife.

Q. About what length?

A. Maybe three inches. It wasn't a real big knife.

THE COURT: You said how many inches?

THE WITNESS: Maybe three inches, sir. I'm guessing.

BY MR. WILLIAMS:

Q. You said not a real big knife.

A. It wasn't very large, no.

Q. Okay.

A. When we -- right as I turned the man over, his pupils seemed to dilate, and I could no longer feel the pulse in his neck.

Q. His eyes dilated?

A. Yes.

Q. What did you do then?

A. I just really stood around until the police arrived.

Q. Okay, sir. I show you a photograph marked Defendant's Exhibit A for identification purposes. Will you please look at that photograph and tell me, is that a depiction of the scene as you recall it?

A. Yes, after I had turned him over.

Q. So you had moved his body?

A. Yes.

Q. Okay. Thank you, sir. And what was the position of his body when you found him, when you got there?

A. He was lying on his left side, facing the door of his truck, and his right arm was out this way. It may have been under the truck. I'm really not certain.

Q. But he was laying over on his left side?

A. Yes.

Q. And do you recall what hand the knife was in?

A. It was in his right hand.

TRANSCRIPT PAGE 149, LINE 8 THROUGH LINE 13 AND PAGE 149 LINE 21 THROUGH PAGE 150, LINE 2

Q. When you first saw him, he was leaning in the truck?

A. Yes.

Q. And he came out with a shotgun; is that correct?

A. Yes.

Q. You didn't pay any attention to that, did you?

A. No.

TRANSCRIPT PAGE 151, LINE 8 THROUGH LINE 15

Q. At any time, did you ever see him walk in front of the door of this vehicle or go up towards -- at any time did you ever see him located up in the front part of his vehicle up by the hood?

A. No.

Q. At all times, was he back behind the

open truck door?

A. I can't say at all times. At all times that I saw him, yes.

TRANSCRIPT PAGE 151, LINE 24 THROUGH PAGE 152, LINE 11

Q. Okay. But you saw Mr. Hodge stumbling and falling backwards and then fall to the ground?

A. I saw him falling, but it was a blurred image. It was not a very clear-cut image. In fact, I wasn't even sure it was a man until I ran all the way over there.

Q. Okay. But you saw whatever it was stumbling and falling backwards and saw it fall to the ground?

A. It was just like that. (Indicating) That's all I saw.

Q. All right. Did it fall to the ground, or when you saw it in that situation, was it somewhere between the yellow pickup truck and the white pickup truck?

A. Yes.

TRANSCRIPT PAGE 153, LINE 12 THROUGH PAGE 154, LINE 1

Q. At no time did you ever see Mr. Clarke anywhere but in the vicinity of his open truck door and behind the truck door? When I say behind the truck door, I mean when you open a truck door up, he was in between the open truck door and the back of his white truck.

A. When I saw him, yes.

Q. On the two occasions you saw him?

A. Yes.

Q. Which would have been just seconds before the shot and instantaneously after the shot?

A. Yes.

Q. It's my understanding that this pocket knife had a -- wasn't a real big one? It had about a three-inch blade on it?

A. I would guess it about that, yes, sir.

TRANSCRIPT PAGE 168, LINE 6 THROUGH TRANSCRIPT PAGE 169, LINE 25

LEROY C. CLARKE:

Q. Okay. When you got in the vicinity of the Highway 6 Gulf Station, what did you decide to do?

A. Well, I needed gasoline. In fact, I was -- I wanted a soda; and I pulled in to get some gasoline, and I thought maybe I'd have a drink.

Q. Thought you would have a soda to drink?

A. A soda, right. I don't drink anything other.

Q. When you pulled in, do you recall whether or not there was anybody parked at the gasoline bays?

A. Yes, there was somebody there, but when you -- I just didn't really concentrate on him because it was just there.

Q. Do you recall the color of the vehicle?

A. It was a yellow truck.

Q. Did you know who owned that particular yellow truck?

A. Not at that time, I didn't.

Q. Do you recall seeing anybody standing in the vicinity of the yellow truck?

A. I'm not sure because I really didn't concentrate on this truck.

Q. Okay.

A. But I -- somebody could have been standing near the truck.

Q. All right. Did you see anybody in the area between the gasoline bays and the Gulf Station?

A. No, I did not.

Q. Did you see any vehicles back there?

A. No, I don't think there was a vehicle back there.

Q. All right. When you pulled in, where did you pull?

A. I pulled in behind the truck that was there.

Q. All right. About how far was your front bumper from his back bumper when you pulled in and stopped?

A. I would say approximately six, seven,

eight feet. Something like this. That would have give plenty of room for somebody to walk through.

Q. What was your intentions after you stopped your truck?

A. To just go in, get some gas and grab a soda, and be on my way.

Q. Would you tell me whether or not you left your truck running or did you cut it off?

A. No, no. I took the keys out of the truck.

Q. You cut the truck off, then?

A. Right.

Q. Took the keys out?

A. Right.

TRANSCRIPT PAGE 170, LINE 20 THROUGH TRANSCRIPT PAGE 171, LINE 8

Q. Well, when I got out of the truck, and I realized this was Mr. Hodges.

Q. Uh huh.

A. And I said to Mr. Hodges, "One of these

days I'll beat your behind for what you're doing to me out there."

Q. All right, that's what you said to him?

A. That's what I said.

Q. He turned, and you recognized who he was?

A. Oh, yes.

Q. Okay. Now let me ask you this, Leroy. How did you say that to Mr. Hodges?

A. Well, just matter of factly. I didn't say it in an aggressive manner or disturbing manner. I just made a comment to him.

TRANSCRIPT PAGE 173, LINE 9 THROUGH TRANSCRIPT PAGE 181, LINE 21

Q. All right. Now, Leroy, at this time you had said that. What were your intentions right at this time?

A. Well, just to make the remark to him, and I ---

Q. Did you intend ---

A. I was just going to go on and walk on

by him.

Q. Where did you intend to walk?

A. I was going to go in the store. In the station.

Q. Okay. How were you -- what route were you going to take to do that?

A. I would have walked right around the front of my truck.

Q. At this time did you see anybody else outside in the bay area of the station where the pumps are located?

A. I didn't notice anybody there.

Q. Would you tell me, Leroy, what happened then? You've said this remark, intended to walk. What occurred?

A. Mr. Hodges turned to me, and he had this knife in his hand.

Q. How was he holding the knife?

A. The knife was being held like this. (Indicating)

Q. Would it have the blade up in the front part then?

A. The blade was protruding out this way.

Q. Okay. What happened? What did he say? What occurred?

A. He said to me, "You son of a bitch, this place is not big enough for both of us. Do it now." Or, "Try it now." I'm not sure.

Q. What was he doing while he was saying that?

A. He had this -- he was coming right straight toward me.

Q. Okay. And where was the knife?

A. The knife was in his hand.

Q. All right. When you saw the man say that to you, or heard him say it to you and saw him coming toward you with a knife, what did you do?

A. Well, I -- actually, I didn't know what to do. I just stood for a second, watching this knife. And then I thought about getting back in the truck, but then he was right on my front fender.

Q. Okay.

A. And I knew if I jumped in that truck he would cut me or he would slash me with that knife.

Q. Where were the keys at the time?

A. It was in my shirt pocket.

Q. What did you do?

A. I just looked in the truck. I saw that little .410, and I just jerked it out and hollered, "Stop." And he just kept coming, and I just stepped backwards and fired over the door.

Q. Okay. When you reached for the .410, about where was he standing?

A. He was right about four feet away from me.

Q. Would that be right about the front part of your truck?

A. It would have been right about the front fender of my truck.

Q. When you came back out with the gun, where was Shelby Hodge standing?

A. He was right at my door.

Q. And what did you do?

A. I just yelled, stop or something to this effect; and I just stepped back and tried to get away from him and ---

Q. You took a step back like this?

A. Well, I just stepped back, and the gun just went off.

Q. Well, let me ask you this. Where was the muzzle of the gun aimed?

A. Actually, I was looking at his arm. I was looking ---

Q. Which arm was this?

A. His right arm, with the knife. Now ---

Q. Let me ask you this one thing. You were looking at his arm with the knife?

A. Right.

Q. How was he holding the knife when you came back up with the shotgun?

A. At this point the knife was like this. (Indicating)

Q. And how was his arm?

A. His arm was in an upraised position, and the knife was sticking out of his hand like this.

Q. And you say the muzzle of the gun was pointed toward his arm?

A. I pointed it toward his arm.

Q. Was it your intention to kill him?

A. I had no intention to do bodily harm to Mr. Hodges.

Q. You fired the gun at that point. What happened to Mr. Hodges?

A. Well, he just -- he just reeled backwards and just turned and fell. Staggered, just reeling backwards.

Q. Do you know the vicinity of where he fell? Did he fall between the two trucks, or did he fall back by his truck, or where did he fall?

A. Between the two trucks. It was nearer to his truck than it was to mine.

Q. All right. When you fired the shot at his arm with the knife in it, where was he standing in relation to your truck?

A. This is my truck.

Q. Uh huh.

A. He was right here.

Q. If this is the front of the door, and if this is the door and this is the front of the truck, and you're standing here with the shotgun, where was he in relationship to the door?

A. He was right behind the door.

Q. He had come right up to the door?

A. He was almost right at the door.

Q. All right. When you stepped back, would you tell me how far you think you and the gun were from Mr. Hodge?

A. I would -- I would say three and a half, maybe four feet.

Q. And after the shot was fired, he went reeling backwards?

A. Reeling backwards, and fell.

Q. Okay. When he was coming around the front of your truck and you saw the .410, why didn't you run right then?

A. Well, I just -- he was too close to me to run.

Q. If you felt you had run, what do you think would have happened?

A. If I had turned, he would have slashed me with this knife.

Q. How fast was he coming toward you?

A. He was walking very briskly. He was coming right toward me, charging.

Q. He wasn't running?

A. He wasn't running, no.

Q. After you fired the shot, what did you do?

A. Stood there for a second, and just said, "My God," you know? And I threw the gun back in the truck, and I ran.

Q. Okay. Why didn't you stop and help him?

A. Well, I was scared. For the first thing, I knew he still had that knife. I din't know how bad he was hurt, and I didn't know if he had any of his friends or anything with him; so all I could think about is just run.

Q. Where did you go?

A. I ran home.

Q. Three-tenths of a mile away?

A. Right.

Q. When you got home, what did you do?

A. I briefly told my wife what I had did. I changed my clothes. She ---

Q. What had you been wearing up to that point?

A. I was wearing dungarees and a dungaree shirt.

Q. You were wearing your hunting clothes?

A. No, just dungarees.

Q. What had you been doing in those clothes that day?

A. Well, actually, it was the same clothes I had been working in.

Q. You went home, and you changed your clothes?

A. Right.

Q. What did you do then?

A. I got back into -- no, I left the truck and got in my little car, and I speed off up to my cousin's house. Time to think.

Q. Now let me ask you this, Leroy. Where were the keys to the truck? When you

left.

A. In the ignititon.

Q. Where did you park the truck when you went to the landing?

A. Right in front of my trailer.

Q. Where was the little .410 shotgun?

A. Still laying in the truck.

Q. When you left, would you tell me whether or not you gave instructions to anyone regarding that gun?

A. I didn't even think about that gun. I told no one nothing about that gun. I didn't even want to see it.

Q. Leroy, you then went up to your cousin's. On the way up to your cousin's, what did you do?

A. Well, I knew that I had did something terrible, and I should turn myself in.

Q. Okay. When you got up to your cousin's place, what did you do?

A. I told him I'd like to call Mr. Broughton and turn myself in.

Q. And that's Mr. James Broughton, the

black officer we saw earlier today?

A. Right.

Q. And when -- you were up at your cousin's home at that time; is that correct?

A. Right.

Q. What did you do next?

A. I called Mr. Broughton's home. He wasn't there. I spoke briefly to his wife, and I ---

Q. What did you tell her? Don't tell me what she said to you. What did you tell her?

A. I told her my name was Leroy and I was in trouble and I needed to turn myself in to Mr. Broughton.

Q. Based on what she told you, what did you tell her you would do?

A. I told her I would call back in an hour.

Q. Okay. So you didn't speak to Mr. Broughton on that occasion?

A. No.

Q. Would you tell me what you did next?

A. I just sit and waited, and then when the hour was up I called again.

Q. Did you have a -- were you able to talk to Mr. Broughton at that time?

A. No.

Q. What did you do then, since you had been unsuccessful in reaching him?

A. I spoke briefly with my cousin, and he said he would go and ---

Q. Not what he said now.

A. Well ---

Q. Based on your conversation with your cousin, what did you ask him to do?

A. I asked him to go find Mr. Broughton.

Q. And do what?

A. And tell him where I was at and tell him to come and get me.

Q. And did he do that?

A. He did that.

Q. And did you turn yourself in?

A. Yes.

TRANSCRIPT PAGE 193, LINE 25 THROUGH PAGE 194, LINE 23

Q. Mr. Clarke, was there any bad blood between you and Shelby Hodge?

A. No, there was no bad blood between us.

Q. Did you know Mr. Hodge?

A. I knew him well.

Q. How did you know him?

A. Mr. Hodge was a tenant of mine for quite a while.

Q. How long ago was that?

A. Oh, about three years ago.

Q. During the period of time he was a tenant, did anything unusual happen?

A. Not really, other than ---

Q. Would you consider him a good tenant or a bad tenant?

A. I would consider him as being a good tenant.

Q. Did anything happen with regard to any assistance you rendered Mr. Hodge while he was your tenant?

A. Yeah. Once he got stranded on the lake.

Q. What lake is that?

A. That's Lake Moultrie. And it was 14 degrees, and I personally organized and called the rescue, and I personally stayed on the lake until twelve o'clock at night, in a boat by myself, searching for Mr. Hodge. I consider I helped save his life. Therefore, there was no bad blood between us.

TRANSCRIPT PAGE 215, LINES 14 THROUGH 18

THE COURT: Is it stipulated that Lieutenant DeFreese is a ballistics expert employed by the South Carolina Law Enforcement Division, and that he is a qualified ballistics expert?

MR. WILLIAMS: We so stipulate, Your Honor.

TRANSCRIPT PAGE 220, LINE 2 THROUGH TRANSCRIPT PAGE 221, LINE 19

Q. Now based on the materials that you had, did you subsequently, at the request of the Solicitor's Office for

Berkeley County and the defense attorney for Mr. Leroy Clarke, conduct a series of tests using Defendant's Exhibit Number 7?

A. I did, sir, yes.

Q. And would you tell us exactly how you conducted the tests. In other words, how was the test conducted?

A. All right, sir. I was requested, in addition to identifying that particular shotgun shell and identifying the wadding and pellets, to approximate the distance from the muzzle of Defendant's Exhibit 7, the combination shotgun-rifle, to a shirt. I was asked to approximate the distance between the two at the time of discharge of the shotgun, Defendant's Exhibit 7.

This was done by loading the shotgun with the same type of ammunition as indicated in Defendant's Exhibit 8; that is, Winchester-Western, three-inch, .410 shotgun shell

ammunition, loaded with number 6 birdshot.

The tests which I conducted were done at various different ranges from two feet to eight feet, in an attempt to find that range at which the spread of the shot most closely approximated the spread of the shot in the shirt, which I also received.

The range of four feet from the muzzle of Defendant's Exhibit 7, the shotgun, to the shirt, which I received, most closely approximated the diameter of the hole of he shirt. There is, of course, some variation in the size of the shot swarm or shot pattern. The variation would be from shot to shot or from shell to shell. So it's somewhat imprecise.

It could be that, at distances of three feet, the same thing could occur; or at distances as much as five feet away the same shot spread could occur.

Q. Do you have an opinion, though, Lieutenant DeFreese, the maximum distance that this discharge could have struck Shelby Hodge would have been a maximum of five feet?

A. Yes, sir. At ranges beyond five feet, there is a significantly larger spread of the shot.

Q. Okay. And it could have been as close as three, three and a half, or four feet?

A. Yes, sir. Almost any distance between three and five feet could have been the distance. That four feet ---

TRANSCRIPT PAGE 222, LINES 6 THROUGH 15

Q. Could you also tell me, sir, in your expert opinion-- or do you have an expert opinion -- whether or not the discharge into Mr. Hodge's shirt could have been as far away as twelve feet by this weapon?

A. It would be my opinion, no, sir, it could not have been twelve feet.

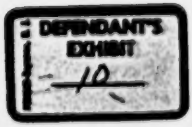
Q. How about as far as fifteen feet?

A. No, sir. Any range beyond about five feet starts to show a significantly larger spread than that that is suggested by the hole in the shirt.

APPENDIX C (2)

PERTINENT TRIAL EXHIBITS

D-14 Photograph of shirt and entrance wound of deceased as seen by Corporal Brougton



D-10 Photograph of teardrop shape in deceased's shirt

D-12 Photograph of test pattern fired onto shirt at a distance of four feet

APPENDIX C (3)

TRIAL COURT'S INSTRUCTIONS TO JURY OBJECTED TO BY THE PETITIONER

TRANSCRIPT PAGE 271, LINES 7 THROUGH 17

We speak of a reasonable doubt as a substantial doubt, one arising out of the evidence or the lack of evidence for which one honestly seeking to find the truth can give a reason. If upon the whole case you have a reasonable doubt, the Defendant is entitled to that doubt, or the benefit of that doubt; and youmust find him not guilty and acquit him.

Should you have a reasonable doubt as to the defense which he has put up, again you must give him the benefit of that doubt and acquit him. ...

TRANSCRIPT PAGE 273, LINE 20 THROUGH PAGE 274, LINE 3

I charge you, ladies and

gentlemen, that this bill of indictment charges the crime of murder. Murder is defined as the killing, or the felonious killing, of any person, with malice aforethought, either express or implied. In order to convict one of murder, the State must not only prove the killing of the deceased by the defendant, but it must also prove criminal intent and that it was done with malice aforethought. ...

APPENDIX C (4)

PETITIONER'S REQUESTED INSTRUCTIONS TO JURY NUMBERED 4, 5, AND 11, WHICH WERE REFUSED BY TRIAL COURT

DEFENDANT'S REQUEST TO CHARGE 4

The term "not guilty" is not synonomous with "innocence." In our system of criminal justice, the term "not guilty" means that the State did not prove the defendant guilty beyond a reasonable doubt of each element of an offense; "not guilty" does not mean that you must find the defendant "innocent" of the crime with which he was charged. The charges were simply not proven by the State.

DEFENDANT'S REQUEST TO CHARGE NO. 5

Criminal intent under the law means an intent in the defendant's mind at the time of the commission of an act to violate the criminal law by commission of

that act. In other words, "criminal intent" means the intention of the defendant to premediatedly murder the deceased.

DEFENDANT'S REQUEST TO CHARGE NO. 11

Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.' (People v. Garcia, California Court of Appeals, December 29, 1975). (Commonwealth v. Webster, 59 Mass. (5Cush.) 295, 320).

APPENDIX C (5)

NOTICE OF INTENTION TO APPEAL

NOTICE OF APPEAL

Leroy Clark, appeals from the Orders, Exceptions to charge, and verdict and sentence of The Honorable Clyde Elztroth, The Court of General Sessions of the Ninth Judicial Circuit, Berkeley County, State of South Carolina, dated January 13, 1982.

LEROY CLARKE

By Counsel

82-1431

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

LEROY CLARKE, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

LEROY CLARKE, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

QUESTIONS PRESENTED

I.

Did the trial court's instruction to the jury on reasonable doubt impermissibly shift the burden of proof to Petitioner to establish a doubt for which a juror could articulate a reason before acquitting him?

II.

Did the trial court err by defining reasonable doubt as a substantial doubt for which a reason must be given? Further, did the trial court err by refusing Petitioner's requested instruction number 11 on reasonable doubt? Did the trial court's instruction deny Petitioner due process of law by reducing the State's burden to prove each element of the crime beyond a reasonable doubt?

III.

Did the trial judge improperly define criminal intent as an element of murder?

IV.

Did the trial court err by refusing to give the jury Petitioner's requested charge number 4 which distinguished between the terms "not guilty" and "innocent"?

INDEX

CASES INVOLVED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

LEROY CLARKE, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Memorandum Opinion No. 82-MO-371, filed December 28, 1982, as reproduced in Petitioner's Appendix A at page 1.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the trial court's instruction to the jury on reasonable doubt impermissibly shift the burden of proof to Petitioner to establish a doubt for which a juror could articulate a reason before acquitting him?

II.

Did the trial court err by defining reasonable doubt as a substantial doubt for which a reason must be given? Further, did the trial court err by refusing Petitioner's requested instruction number 11 on reasonable doubt? Did the trial court's instruction deny Petitioner due process of law by reducing the State's burden to prove each element of the crime beyond a reasonable doubt?

ARGUMENT

I. and II.

The trial judge's instruction to the jury on reasonable doubt did not impermissibly shift the burden of proof to Petitioner to establish a doubt for which a juror could articulate a reason before acquitting Petitioner. The trial judge did not err by defining "reasonable doubt" as a substantial doubt for which a reason must be given; further the trial judge did not err by refusing Petitioner's requested instruction number 11 on reasonable doubt. The trial judge's jury instructions on reasonable doubt did not in any manner deny Petitioner due process of law by reducing the State's burden to prove each element of the crime beyond a reasonable doubt. [Petitioner's Arguments I and II].

Petitioner contends the trial judge erred in his charge on reasonable doubt, because his phraseology impermissibly shifted the burden of proof to Appellant to establish a reasonable doubt as to his guilt, and incorrectly charged the jury that they had to articulate a reason for that doubt. Petitioner contends the trial judge's use of the word "one" in the following context may have allowed the jury to infer that Appellant had to establish reasonable doubt:

> Now by the term reasonable doubt we mean a doubt for which one can give a reason. ... We speak of a reasonable doubt, one arising out of the evidence or the lack of evidence for which one honestly seeking to find the truth can give a reason. If upon the whole case you have a reasonable doubt, the defendant is entitled to that doubt and the benefit of that doubt; and you must find him

not guilty and acquit
him.
(Tr. p. 270, line 20 -
p. 271, line 14) (emphasis
added).

In the context of the trial judge's extensive charge on the presumption of innocence, the State's burden of proof and reasonable doubt, the above argument has no merit. The trial judge continually stressed that proof of each element of murder must be beyond a reasonable doubt. See Tr. p. 269, line 13 - p. 271, line 21; p. 274, lines 3-4; p. 275, lines 3-14.

Petitioner then contends the trial judge erroneously equated "substantial doubt" with "reasonable doubt," thereby reducing the State's burden to establish every element of the crime beyond a reasonable doubt. Respondent disagrees. The South Carolina Supreme Court has recently upheld the validity of a

virtually identical charge as fully complying with the dictates of In the matter of Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (1982). Consequently, the charge in question is in accord with the prior case law of this State.

"The purpose of a charge is to enlighten the jury." State v. DuRant, 87 S.C. 532, 70 S.E. 306 (1911). An assignment of error which is predicated upon isolated excerpts which standing alone might be misleading fails if the instructions as a whole are free from error. State v. Daniels, 231 S.C. 176, 97 S.E.2d 902 (1957). Respondent maintains the trial judge accurately instructed the jury concerning reasonable doubt and Petitioner's contention that he was prejudiced by that charge is without merit.

Petitioner further contends the trial judge erred by refusing his requested charge number 11, defining reasonable doubt. See Petitioner's Appendix B(6) at p. 11.

Respondent maintains that because Petitioner's exception V violated the South Carolina Supreme Court's Rule 4, §6 in several respects, that issue was not properly before the South Carolina Supreme Court and thus is not properly before this Court. The exception alleged: "That the trial judge erred in refusing the Appellant's requested charges numbered 2, 4, 5, 6, 7, 11. Appellant was entitled to have such requests charged to the jury because Appellant's requests were proper instructions under the law, and were necessary to properly and fully instruct the jury." (Tr. p. 323).

As the South Carolina Supreme Court has recently stated, such an exception "requires the Court to 'grope in the dark' in an effort to ascertain the precise points in issue." State v. Richardson, et al., ___ S.C. ___, 294 S.E.2d 422 (1982), citing State v. Lawrence, 226 S.C. 423, 223 S.E.2d 856 (1976); State v. Fields, 264 S.C. 260, 214 S.E.2d 320 (1975).

The South Carolina Supreme Court has specifically stated that a mere reference to a request to charge will not be considered as it violates Rule 4, §6 in at least three particulars. State v. Cater, 241 S.C. 262, 127 S.E.2d 822 (1962).

Respondent further contends that even if the South Carolina Supreme Court determined not to dismiss the exception as defective, the trial judge did not

err in refusing Appellant's request to charge number 11 because his charge encompassed the proposition of law requested by Appellant.

QUESTION PRESENTED

III.

Did the trial judge improperly define criminal intent as an element of murder?

ARGUMENT

III.

The trial judge's instructions properly defined criminal intent as an element of murder. [Petitioner's Argument III].

Petitioner contends the trial judge erred in refusing to instruct the jury on his requested charge number 5 as a proper definition of criminal intent. See Petition, p. 31, fn. 1. Respondent disagrees.

Initially, Respondent maintains that because Appellant's exception V violated South Carolina Supreme Court Rule 4, §6 in several respects, that

issue was not properly before the South Carolina Supreme Court and thus is not properly before this Court. The exception alleged: "That the trial judge erred in refusing the Appellant's requested charges number 2, 4, 5, 6, 7, 11. Appellant was entitled to have such requests charged to the jury because Appellant's requests were proper instructions under the law, and were necessary to properly and fully instruct the jury." (Tr. p. 323.)

As the South Carolina Supreme Court has recently stated, such an exception "requires the Court to 'grope in the dark' in an effort to ascertain the precise points in issue." State v. Richardson, et al., ___ S.C. ___, 294 S.E.2d 422 (1982), citing State v. Lawrence, 226 S.C. 423, 223 S.E.2d 856 (1976); State v. Fields, 264 S.C. 260, 214 S.E.2d 320 (1975).

The South Carolina Supreme Court has specifically stated that a mere reference to a request to charge will not be considered on appeal as it violates Rule 4, §6 in at least three particulars. State v. Cater, 241 S.C. 262, 127 S.E.2d 822 (1962).

Respondent further contends that even if the South Carolina Supreme Court determined not to dismiss Appellant's exception as defective, the trial judge did not err in refusing Appellant's request to charge number 5, because his charge encompassed that proposition of law. Respondent maintains that the trial judge's general definition of murder (Tr. p. 273, line 22 - p. 274, line 4), when read in context of the entire charge (Tr. p. 268, line 24 - p. 279, line 10; p. 288, line 16 - p. 289, line 15), sufficiently informed the jury

of the correct law regarding intent. The South Carolina Supreme Court has stated that in reviewing a jury charge for error the charge will be considered as a whole in light of the evidence presented at trial. State v. Thompson, ___ S.C. ___, 292 S.E.2d 581 (1982).

The case law reveals that the question of felonious intent is an issue of fact for the jury. State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960). Absent an admission by the defendant, proof of intent necessarily rests on inferences from the defendant's conduct, State v. Haney, 257 S.C. 89, 184 S.E.2d 344 (1971), and such conduct should be considered in light of the given circumstances, State v. Tuckness, 257 S.C. 295, 185 S.E.2d 607 (1971).

Respondent maintains that the trial judge's charge adequately covered the

substance of defendant's requested charge; thus the requested charge was properly refused. See State v. Griffin, 277 S.C. 193, 285 S.E.2d 631 (1981); State v. McDowell, 272 S.C. 203, 249 S.E.2d 916 (1978). Further, the South Carolina Supreme Court has held that the trial judge has no duty to grant a requested charge which does not correctly state the law or which may confuse or mislead the jury. Respondent asserts that Petitioner's requested instruction on intent could have confused or misled the jury, and that the trial judge properly refused to so charge. State v. Simmons, 269 S.C. 649, 239 S.E.2d 656 (1977).

QUESTION PRESENTED

IV.

Did the trial court err by refusing to give the jury Petitioner's requested charge number 4 which distinguished between the terms "not guilty" and "innocent"?

ARGUMENT

IV.

The trial court did not err by refusing to charge Petitioner's request to charge number 4. [Petitioner's Argument IV].

Petitioner contends the trial judge erred in refusing to charge the jury his request to charge number 4, found at page 35 of the Petition. According to Petitioner, the trial judge's charge did not properly inform the jury of the distinction between the two terms. Respondent disagrees.

Initially, Respondent maintains that because Appellant's exception V violated South Carolina Supreme Court Rule 4, §6 in several respects, that issue was not properly before the South Carolina Supreme Court and thus is not properly before this Court. The exception alleged: "That the trial judge erred in refusing the Appellant's requested charges numbered 2, 4, 5, 6, 7, 11. Appellant was entitled to have such requests charged to the jury because Appellant's requests were proper instructions under the law and were necessary to properly and fully instruct the jury." (Tr. p. 323).

As the South Carolina Supreme Court has recently stated, such an exception "requires the Court to 'grope in the dark' in an effort to ascertain the precise points in issue." State v.

Richardson, et al., ___ S.C. ___, 294 S.E.2d 422 (1982), citing State v. Lawrence, 226 S.C. 423, 223 S.E.2d 856 (1976); State v. Fields, 264 S.C. 260, 214 S.E.2d 320 (1975).

The South Carolina Supreme Court has stated specifically that a mere reference to a request to charge will not be considered, as it violates Rule 4, §6 in at least three particulars. State v. Cater, 241 S.C. 262, 127 S.E.2d 822 (1962).

Respondent further contends that even if the South Carolina Supreme Court determined not to dismiss this exception as defective, the trial judge did not err in refusing Petitioner's request to charge number 4 because his charge encompassed that proposition of law requested by Petitioner.

Petitioner argues that the trial judge's failure to charge his request to charge number 4 (Tr. p. 304) failed to inform the jury of the legal difference between the two terms. Petitioner contends the jury could have believed he committed the crime, but not that he committed it beyond a reasonable doubt.

Respondent maintains the requested charge is misleading because it might confuse the jury as to the burden of proof. A trial judge has no duty to give an instruction which is either a misstatement of the law or which may confuse and mislead the jury. State v. Simmons, 269 S.C. 649, 239 S.E.2d 656 (1977). Respondent further contends the last sentence of charge number 4 ["the charges were simply not proven by the State."] would be an impermissible comment on the facts. Further,

Respondent maintains the trial judge's charge regarding the two possible verdicts (Tr. p. 277, line 16 - p. 278, line 3), when read in conjunction with his extensive charge regarding the presumption of innocence and the State's burden of proof (Tr. p. 269, line 13 - p. 271, line 21), completely and clearly delineated the jury's role in imposing a verdict.

This Court has held that any alleged error in the judge's instruction must be read in context of the entire charge. State v. Thompson, ___ S.C. ___, 292 S.E.2d 581 (1982). When viewed in context of the entire charge in this case, Respondent maintains that there was no error and that the trial judge properly refused requested charge number 4.

The Respondent thus submits that the holding of the South Carolina Supreme Court in this case did not deny Petitioner any of his constitutional rights, and that the Petitioner is not entitled to a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT.

APPENDIX

(Tr. p. 268, lines 24-25)

THE COURT: Ladies and gentlemen of the jury, by this bill of indictment, the paper which I hold in

(Tr. p. 269, lines 1-25)

my hand, the State of South Carolina charges the defendant at the Bar, Leroy C. Clarke, with the crime of murder. You will have this with you during your deliberations. You may read it; but you may not consider that it has any weight, because this is just an accusation that the State makes against Mr. Clarke. This is not evidence. This is not proof. You may not give it any consideration other than to find out what the charges are.

Under the law of South Carolina, the defendant is charged with the

offense known as murder. To this indictment, the defendant has pled not guilty. The plea of not guilty places the burden upon the State of South Carolina to prove his guilt beyond a reasonable doubt to the satisfaction of each and every one of you. Such burden of proof is never shifted to the defendant. It remains with the State of South Carolina throughout the matter.

A person charged with a criminal offense in this State, and in all the states our great country, are presumed to be innocent of the charges. They are never required to prove their innocence because, as you ladies and gentlemen know, that's not always possible. A presumption of innocence attaches to the defendant at the time of his first

(Tr. p. 270, lines 1-25)

appearance at the time of his first arraignment, and it remains with him throughout his trial and throughout your deliberations. It can only be removed by evidence which convinces you of his guilt beyond a reasonable doubt.

Our Supreme Court has said that the presumption of innocence is like a cloak or robe of rightecusness placed about the shoulders of the defendant; and it assigns him to that class, the innocent, until that presumptive robe of righteousness has been stripped from his body by evidence satisfying you of his guilt beyond a reasonable doubt.

I say to you, ladies and gentlemen, that's not a mere legal phrase. It's not just legal theory, but it is a substantial right to which this defendant and every defendant is

entitled. The presumption of innocence stays with him until you ladies and gentlemen are satisfied that the evidence has convinced you beyond a reasonable doubt of his guilt.

Now by the term reasonable doubt we mean a doubt for which one can give a reason. Not a whimsical doubt. Not a fanciful doubt. Not an imaginary doubt. Not a weak doubt. Not a slight doubt. It's none of those things. As you and I know, we might doubt anything. We might well doubt where this

(Tr. p. 271, lines 1-25)

electricity comes from because, if you're like me, you're not of a scientific mind; but we know that electricity comes from generators that may be far off or they may be near. And so if we doubted that this was generated by the turning of a motor, we would know

that that was not a reasonable doubt.

We speak of a reasonable doubt as a substantial doubt, one arising out of the evidence or the lack of evidence for which one honestly seeking to find the truth can give a reason. If upon the whole case you have a reasonable doubt, the defendant is entitled to that doubt, or the benefit of that doubt; and you must find him not guilty and acquit him.

Should you have a reasonable doubt as to the defense which he has put up, again you must give him the benefit of that doubt and acquit him. If, on the other hand, you feel that the State has established the guilt of the defendant beyond a reasonable doubt, then it would equally be your duty to find him, upon your sworn oath, guilty.

Under the Constitution of our State, you ladies and gentlemen are the

only judges of the facts of this case. It was my duty, during the trial, to pass upon the admissibility of the evidence or

(Tr. p. 272, lines 1-25)

testimony; but the weight of that testimony or evidence, the probative value of it, is for you and you alone.

It is your duty to weigh the evidence, to consider the evidence, to determine the force and effect of that evidence, just as you heard it from the witness stand. I'm not allowed to charge you, either directly or indirectly, on any matter of fact. That simply is not my job. It is yours.

If during this trial, because of some ruling I've made, some statement I've made, something I've done or failed to do, you feel that you recognize my feeling about the evidence, you would

disregard that because, as I have said to you, ladies and gentlemen, that simply isn't my job.

As the judges of the facts, you ladies and gentlemen must pass upon the credibility or the believability of the several witnesses who have testified from that witness stand. In doing this you should take into consideration any interest that a witness has in the outcome of the case, any bias or prejudice that a witness may have, the opportunity of the witness for observation and knowledge, the demeanor of the witness on the witness stand, and anything else that might affect your feelings in

(Tr. p. 273, lines 1-25)

regard to the credibility of the witnesses.

It is your job, ladies and

gentlemen, to find the truth, whether it comes from the witnesses for the State or witnesses for the defendant, or both. I tell you, ladies and gentlemen, that you may believe one witness against several. You may believe several against one. You may believe everything a witness says. You may believe nothing a witness says. On the other hand, you may believe a part of what a witness says and disbelieve a part of what that same witness says. Now you may not do that arbitrarily, but only if there is a reason in the evidence for your so doing.

Having determined what the true facts are, ladies and gentlemen, it then becomes your duty to take the law as I now charge it to you and apply it to those facts and thereby return a true verdict, a just verdict, a verdict fair to the defendant and fair to the State

of South Carolina.

I charge you, ladies and gentlemen, that this bill of indictment charges the crime of murder. Murder is defined as the killing, or the felonious killing, of any person, with malice aforethought, either express or implied. In order to convict one of murder, the State must not only prove the killing

(Tr. p. 274, lines 1-25)

of the deceased by the defendant, but it must also prove criminal intent and that it was done with malice aforethought. Such proof, of course, must be beyond a reasonable doubt.

You ask what is malice? Malice is defined in the law of homicide as a term of art; that is, a technical term importing wickedness and excluding just cause or excuse. It is something which springs from wickedness, from depravity,

from a heart devoid of social duty and fatally bent upon mischief. The words express or implied do not mean different kinds of malice, but merely the manner in which the only known--the only kind known to the law may be shown to exist. That is, either expressed or implied.

Malice may be expressed as where previous threats or vengeance or lying in wait, or other circumstances, show directly that an intent to kill was really entertained. Malice may also be implied as where, though no express intent to kill is proven by express or direct evidence, it is indirectly but necessarily inferred from the facts and the circumstances of the case which are proven.

Malice may be implied or presumed from the willful, deliberate and

intentional doing of an unlawful act, without just cause or excuse. In its

(Tr. p. 275, lines 1-25)

general signification, malice means the doing of a wrongful act intentionally, without justification or excuse. Malice may be inferred, as I say, or presumed, from the use of a deadly weapon; but that presumption, ladies and gentlemen, like all presumptions, is rebuttable and may be rebutted by evidence that raises a reasonable doubt in your mind as to the truth of the presumed fact.

The defendant does not have the burden of disproving the presumed fact, either by a preponderance of the evidence nor beyond a reasonable doubt; but it is sufficient, if the evidence raises a reasonable doubt in your mind of the existence of the presumed fact.

The defendant has entered, in this

case, what we lawyers call the defense of self defense; and I tell you that self defense is a good defense. Based upon the prior decisions of our Court, it must appear that the defendant was without fault in bringing on the difficulty, that he actually believed he was in imminent danger of losing his life or of sustaining serious bodily injury.

If his defense is based on his actual belief of imminent danger that a reasonable prudent person of ordinary firmness and courage would have entertained

(Tr. p. 276, lines 1-25)

the same belief, or if his defense is based on his being in actual and imminent danger that the circumstances were such as would warrant a man of ordinary prudence, firmness and courage

to strike the fatal blow in order to save himself from serious bodily harm or of losing his own life.

I tell you that it is one's duty to avoid taking a human life where it is possible to prevent it, even to the extent of retreating from his adversary, unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased. And further, that he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance.

Ladies and gentlemen, I sometimes say I'm not concerned with what your verdict will be because that's your responsibility, not mine. Of course,

I'm concerned with what your verdict be. I'm concerned that your verdict speak the truth because that is what you're sworn to do, ladies and gentlemen, a true verdict render, according to the law and evidence, so help you God.

I'm sure, ladies and gentlemen, that during

(Tr. p. 277, lines 1-25)

these few days that we've been together you've heard some of these people in this courtroom, in addressing me, say "Your Honor". They're not speaking to Clyde Eltzroth when they say that, ladies and gentlemen. They speak to the position I hold because, as your presiding judge, I hold in my hands the honor of Berkeley County and of South Carolina. So long as I preside with fairness, that honor will not be soiled. God help me should I ever preside otherwise.

When you come here as judges of the facts and take the solemn oath which you have taken, you must share with me this awesome responsibility. I tell you, ladies and gentlemen, that you have no friends to reward. You have no enemies to punish. Your only responsibility is to speak the truth.

There can be only one of two verdicts in this case. I give these to you now, and pay no attention, ladies and gentlemen, to the order in which I give them to you because I could reverse them just as well. I have to give you one before I can give you the other. If I could give you both of them at one time, of course, I would do that; but I cannot. You may either find the defendant guilty or not guilty, according to the way that you view the evidence.

Each and every one of you must agree on the

(Tr. p. 278, lines 1-25)

verdict before it may be written. When you have all agreed upon a verdict then, Mr. Foreman, you will write the verdict for the jury. You will note on the back of the indictment, printed in bold black type, is the word verdict. Under it are several lines. Write the verdict of the jury on one of those lines, and then you'll see the word foreman down below. Sign your name above that line.

I may have made some error in my charge to you, ladies and gentlemen; and I may have left out some very important rules of law. I'll take that up with these fine gentlemen after you have gone out of the room; and if they call to my mind something that I should charge you further or some correction I should make, I will ask you to come back; and I

will at that time try to correct or extend my remarks.

Take with you the exhibits which have been entered. Take the indictment with you. You may not consider this as evidence, but the exhibits are evidence. Give me two or three minutes before you start your deliberations so that I can discuss these matters with the lawyers.

If you do not hear from me in the next three or four minutes, then start your deliberations.

(Tr. p. 279, lines 1-10)

When you have all agreed, Mr. Foreman write the verdict, sign your name, knock upon the door. Your bailiff will hear you. You will come back, and your verdict will be published, and that will complete your work in regard to this case.

You're not, of course, concerned with punishment in this case, ladies and gentlemen. That's not your responsibility. The only question you're concerned with is whether your verdict shall be guilty or not guilty. You may retire.

(Tr. p. 288, lines 16-25)

THE COURT: Ladies and gentlemen, I charged you that the use of a deadly weapon might cause a presumption of malice. I would say to you, ladies and gentlemen, if the facts are proved sufficient to raise a presumption of malice to your satisfaction, and it is always for you, the jury, to determine from all of the evidence in the case whether or not malice has been proved beyond a reasonable doubt.

In other words, ladies and gentlemen, I tell you that, in regards

to implied or presumed malice,

(Tr. p. 289, lines 1-15)

that is evidentiary. It does not require you to infer malice, but it permits it.

The presumption or inference of malice from the use of a deadly weapon is, therefore, simply an evidentiary fact to be taken into consideration by you ladies and gentlemen of the jury, along with all of the other evidence in the case, and to be given such weight as you ladies and gentlemen determine it should receive.

The inference of malice may be drawn from the use of a deadly weapon if you conclude such is proper, after considering all of the facts and circumstances of the matter. Thank you so much, ladies and gentlemen. You may return to your room, and you gentlemen may return to the other room.

(Tr. p. 304)

CHARGES

DEFENDANT'S REQUEST TO CHARGE NO. 2

The Court instructs the jury that the law presumes every person charged with crime to be innocent until the State has established his guilt by evidence so strong, so clear, and so conclusive, that there is left in the minds of the jury no reasonable doubt as to his guilt. This presumption is an abiding presumption, and goes with the accused through the entire case and applies at every stage thereof until repelled by proof. And in this connection the jury is instructed that it is never sufficient that the accused, upon speculative theory or conjecture, may be guilty; or that by the preponderance of the testimony his guilt is more probable than his innocence;

for until his guilt has been proved beyond all reasonable doubt in the precise and narrow terms as charged in the indictment, the presumption of innocence still applies, and they must acquit him. (1 Lee 439, 132 Va. 665).

DEFENDANT'S REQUEST TO CHARGE NO. 4.

The term "not guilty" is synonomous with "innocence." In our system of criminal justice, the term "not guilty" means that the State did not prove the defendant guilty beyond a reasonable doubt of each element of an offense; "not guilty" does not mean that you must find the defendant "innocent" of the crime with which he was charged. The charges were simply not proven by the State.

(Tr. p. 323, lines 7-12)

V.

That the trial judge erred in refusing the Appellant's requested charges numbered 2, 4, 5, 6, 7, and 11. Appellant was entitled to have such requests charged to jury because Appellant's requests were proper instructions on the law, and were necessary to properly and fully instruct the jury.